(10)

No. 05-1126

Supreme Court, U.S.
FILED
APR 6 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR *AMICUS* IN SUPPORT OF PETITIONERS

MARK FUCHS
GENERAL COUNSEL
LOUISIANA-PACIFIC CORP.
414 Union St.
Suite 2000
Nashville, Tennessee 37219
(615) 986-5600

PAUL H. FRIEDMAN
Counsel of Record
REBECCA P, DICK
DECHERT LLP
1775 Eye St., N.W.
Washington, DC 20006
(202) 261-3300

Counsel for Amicus

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Amicus Louisiana-Pacific Corp. will address: Whether allegations of parallel conduct by the defendants, without more, suffice to state a claim of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, when it is settled law that proof of parallel conduct without more would not entitle the plaintiff to relief?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
REASONS FOR GRANTING *CERTIORARI*	6
I. THE DECISION BELOW THREATENS TO PUNISH FIRMS IN COMMODITY BUSINESSES FOR PROCOMPETITIVE RESPONSES TO MARKET CONDITIONS	6
II. MODERN ANTITRUST LITIGATION IS INTRUSIVE, DISRUPTIVE, AND EXPENSIVE	9
III. THE DECISION BELOW ERODES A FUNDAMENTAL DISTINCTION IN THE SHERMAN ACT BETWEEN UNILATERAL AND CONCERTED ACTION	11
IV. THE DECISION BELOW INCORRECTLY APPLIES THE FEDERAL PLEADING RULES	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 14
Car Carriers, Inc. v. Ford Motor Corp., 745 F.2d 1101 (7th Cir. 1984) 15
DM Research, Inc. v. College of American Pathologists, 170 F.3d 53 (1999) 13, 14
Dura Pharmaceuticals, Inc. v. Broudo, 125 S. Ct. 1627 (2005) 12
Evans v. Pearson Enterprises, Inc., 434 F.3d 839 (6th Cir. 2006) 10
In re Flat Glass Litigation, 385 F.3d 350 (3d Cir. 2004) 12
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 6, 12, 13
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 5, 12
Stachowski v. Town of Cicero, 425 F.3d 1075 (7th Cir. 2005) 10
Swierkiewicz v. Sorema, 534 U.S. 506 (2002) 13
Theatre Enters., Inc. v. Paramount Film Distrib. Corp. 346 U.S. 537 (1954) 7
United States v. Colgate & Co., 250 U.S. 300 (1919) 12
Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) 13

STATUTES

15 U.S.C. § 1 ..... 5, 7, 11
15 U.S.C. § 2 ..... 5, 11
15 U.S.C. § 18a 9

TABLE OF AUTHORITIES

OTHER AUTHORITIES — Page

Federal Rule of Civil Procedure 8(a) ..... *passim*
Federal Rule of Civil Procedure 12(b)(6) ..... *passim*
P. Areeda and H. Hovenkamp, VI Antitrust Law ¶¶ 1402, 1405 (2d ed. 2003) 7, 11
S. Gawlicki, "GCs Find New Ways to Cut Discovery Costs," *Inside Counsel.com* (Dec. 1, 2005), *available at* http://www.insidecounsel.com/issues/ insidecounsel/15_169/technology/236-1.html 9
Comment of M. Kirk, American Intellectual Property Law Association, to the Antitrust Modernization Commission, (July 25, 2005), *available at* http://www.amc.gov/public_studies_fr28902/new_economy_pdf/05725_AIPLA-New% 20Economy.pdf 10
S. Sher and D. Teshima, "e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations," *Antitrust Source* (November 2005), *available at* http://www.wsgr.com/PDFSearch/sher1105.pdf 9

IN THE

Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The adverse effects of the decision below extend well beyond the telecommunications industry. Firms like *amicus* Louisiana-Pacific Corporation, which compete in commodity businesses, are most likely to feel the full force of this decision because competitive behavior in commodity businesses is quite often parallel: when a service station on one corner of

[1] No one other than the named *amicus* wrote this brief in whole or in part, or made any monetary contribution to its preparation. The parties' written consents to the filing of this brief are being filed with the Clerk herewith.

an intersection changes its prices, a perfectly competitive, unilateral response of a service station on the opposite corner is to follow suit. All will agree that such behavior is perfectly lawful under the Sherman Act. Nevertheless, under the Second Circuit's decision below, allegations of such parallel action, coupled with the bald assertion that the two service stations conspired to raise prices, is sufficient to survive a motion to dismiss.

The standard articulated by the Second Circuit is wrong. Unless reversed, the decision below will have a chilling effect on procompetitive behavior in commodity markets. Firms will hesitate before responding to market conditions the same way a competitor has done even though that may be the best competitive choice. Frivolous lawsuits will clog the courts and burden firms that are guilty of nothing more than competing vigorously. These taxes on competition serve no useful purpose.

Amicus Louisiana-Pacific Corporation is a leading manufacturer of home building products in North America. Its most significant product, oriented strand board, or "OSB," is sold as a commodity for which sales prices fluctuate daily based on market factors over which it has little or no control. OSB is an innovative, affordable, and environmentally smart product made from wood strands arranged in layers and bonded with resin. OSB serves many of the same uses as unsanded plywood, including roof decking, sidewall sheathing, and floor underlayment, but it can be produced at significantly lower cost than plywood. In 2004, North American sales of OSB structural panels totaled approximately 26 billion square feet. Louisiana-Pacific believes it is the largest and one of the most efficient producers of OSB in North America.

Amicus Louisiana-Pacific has fresh experience with meritless antitrust claims based solely on allegations of parallel conduct. In February and March, 2006, Louisiana-Pacific

was one of eight defendants named in multiple complaints alleging—solely on the basis of parallel conduct—a conspiracy among producers of OSB to curtail OSB production and to fix prices. *Amicus* Louisiana-Pacific is committed to compliance with the law. It believes these claims are without merit, and will vigorously defend these matters in the appropriate courts.

If the standard articulated by the Second Circuit stands, it will become difficult for law-abiding firms that sell commodity products to defeat frivolous claims on a motion to dismiss. Those firms will be forced to endure full-blown discovery when, under Rule 8(a) and the plus-factors analysis followed in other circuits, the case should have been dismissed for failure to state a claim under Fed. Rule Civ. P. 12(b)(6). For these reasons, Louisiana-Pacific urges the Court to grant *certiorari* and reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

Firms that sell commodity products like OSB compete primarily on price. Price-focused competition forces such firms to be efficient or fail. The price of commodity products at any point in time is largely a function of the relationship between supply and demand. Since commodity suppliers typically face similar supply and demand forces, it is neither surprising nor unlawful for one seller of a commodity product to undertake strategic conduct that is similar to the conduct of one of its competitors. The competitors may unilaterally decide to increase or decrease price, or expand or contract capacity, at about the same time, given that they are both responding to similar market conditions.

In many of these businesses, buyers and sellers rely to a considerable extent on public information about supply, demand, and prices. Information about past prices is often essential to the efficient operation of commodity markets. Similarly, economic forecasts of supply, demand, and price

are important planning tools for buyers and sellers in such markets. It should not be surprising that firms competing in the same business, with access to the same or similar market information, may choose to pursue the same or similar business strategies.

In commodity markets like those described above, it is easy for a plaintiff to find parallel business conduct. Of course, parallel conduct is not illegal under the antitrust laws. Yet, the decision below requires only that a plaintiff add the conclusory allegation "conspiracy" to the allegations of perfectly lawful parallel conduct to escape dismissal for failure to state a claim. This "standard" is no different than having no standard whatsoever.

Such a legal standard would lead to absurd outcomes. For example, if, while a firm is planning a particular action, a competitor takes similar action, the first firm must reevaluate its plans not only on the basis of changed market circumstances, but also on the likelihood of antitrust litigation if it proceeds with its original decision. Even worse, if the firm takes a particular action, whether it subsequently faces an antitrust challenge will depend in part on whether one of its competitors subsequently mimics its action—something over which the first firm has absolutely no control.

The Second Circuit itself recognized that its holding could distort the competitive landscape in unintended and unwanted ways. For example, a firm may forgo a competitive move it considers advisable and follow a less promising path simply to avoid litigation. If instead the firm makes the business move it prefers and is then sued, the costs of antitrust litigation will be daunting. The time and expense consumed by an antitrust case continue to grow dramatically, now augmented by the technically complex and costly processes for discovery of electronic records. While statistics are difficult to find, those available show that antitrust discovery imposes a significant financial burden on a company and a serious manage-

ment burden on its executives. Indeed, the Second Circuit acknowledged that the prospect of antitrust litigation creates a powerful incentive for defendants to settle even unmeritorious claims, and the court's empty standard for Rule 12(b)(6) dismissal ensures that this incentive will be felt by more and more firms. The Second Circuit's "standard" furthers neither the deterrent nor the compensation policies that underlie the antitrust private right of action. To the contrary, the standard articulated below inappropriately burdens procompetitive behavior in a way that is certain to lead to a diminution in competition. This is the very antithesis of what the antitrust laws are intended to foster.

In addition to the inefficiencies and perverse incentives created by the decision below, it erodes a fundamental distinction in the Sherman Act: the sharply different treatment of unilateral and collective action. The competitive danger of collusive action was deemed by Congress to be so great that it subjected all anticompetitive agreements between two or more firms to antitrust attack. In contrast, Congress deemed the risk of mistakenly deterring aggressive unilateral competition sufficiently great that it prohibited only unilateral conduct that threatens monopolization. Unilateral conduct receives much more lenient treatment than collective conduct so that firms that act unilaterally are not discouraged by the antitrust laws from competing vigorously.

Other circuits have recognized the risk of inappropriately discouraging procompetitive, unilateral behavior and have held that allegations of conspiracy based on parallel conduct alone are not sufficient to state a claim for relief. Those circuits require that antitrust allegations of parallel conduct be complemented by specific allegations that, if proved, would tend to exclude the possibility that defendants acted independently. The decision below adopts a standard that is inconsistent with modern antitrust jurisprudence and, instead, relies on a 1950s-era decision that preceded this Court's decisions in *Monsanto*

and *Matsushita*. If not reversed, the decision below will deter procompetitive conduct by imposing a heightened risk of "false positives" on the defendants. The decision below misapplies this Court's teaching on the Sherman Act and on the pleading rules.

The undesirable and anticompetitive effects of the decision below are potentially far-reaching. The *Twombly* case involves markets with a long history of extensive regulation. Other types of industries will be adversely affected as well. For example, as described herein, the decision below poses significant challenges for firms wishing to compete vigorously selling commodity products. It has the potential to adversely affect a sizeable segment of the nation's economy.

REASONS FOR GRANTING *CERTIORARI*

I. THE DECISION BELOW THREATENS TO PUNISH FIRMS IN COMMODITY BUSINESSES FOR PROCOMPETITIVE RESPONSES TO MARKET CONDITIONS

OSB, Louisiana-Pacific's most significant product, is sold as a commodity. Customers choose a supplier largely based on price, availability, and location. Customers can and do switch suppliers easily in order to obtain the best terms available. Like most commodity products, when supply is high relative to demand, prices are lower. When supply is low relative to demand, prices are higher. These supply and demand pressures apply to all North American suppliers of OSB. The principal use of OSB is for housing. When home construction is strong, so is the demand for OSB. When housing starts soften, so does the demand for OSB. Like many other commodity products, suppliers of OSB can be expected to monitor closely both capacity and demand for their products. It should come as no surprise that, when capacity exceeds demand, many firms consider reducing capacity or delaying capacity expansion, and as a matter of

fact, many will limit production or delay investing in new capacity. Such behavior is not surprising to antitrust scholars, nor is it illegal. As the leading antitrust treatise explains,

> parallel conduct is often forced by circumstance: under such circumstances a 'rational' profit-maximizing firm will always act in a way that is similar to its rivals.

P. Areeda and H. Hovenkamp, VI Antitrust Law ¶ 1405 at 21 (2d ed. 2003) ("Areeda & Hovenkamp"). For this reason among others, parallel conduct does not violate the Sherman Act. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.* 346 U.S. 537, 541 (1954).

As is true with many commodity products that are essentially traded on price, both buyers and sellers of OSB have available to them considerable public information about recent prices and about capacity expansions and contractions in the marketplace. This information enables buyers and sellers lawfully and intelligently to make their own business decisions based on publicly available supply, demand, and price information.

It should come as no surprise, then, that a plaintiff will frequently be able to allege that commodity suppliers followed one another on price and/or output decisions at about the same time, sometimes with knowledge that their competitors had recently made the same moves. There can be no doubt that firms that sell commodity products often make parallel decisions. But that fact, by itself, cannot support a claim of conspiracy under Section 1 of the Sherman Act. The procompetitive response of firms facing the same supply and demand forces may often be to act in similar or even the same ways. This response, when taken unilaterally, is perfectly lawful. Yet, under the standard adopted by the court below, a plaintiff would need only add the word "conspiracy" to its complaint to activate the extortionate power of the American discovery system.

As a practical matter, the standard set by the Second Circuit will make it difficult for firms situated like Louisiana-Pacific to compete vigorously and to run their businesses efficiently without incurring unwarranted and unreasonable antitrust risk. The decision increases the likelihood and frequency of their facing no-win choices. For example, Company A may make a tactical or strategic move that its competitor, Company B, also wants to make, but Company A announces its action first. If Company B nevertheless proceeds with its own unilateral plans, a plaintiff may allege that this parallel conduct must be due to conspiracy. Under the decision below, a motion to dismiss such a complaint might fail even though, if the plaintiff proved the facts alleged, the defendant would be entitled to judgment as a matter of law. In those circumstances, Company B's alternative to risking a frivolous antitrust suit is to abandon the move it considers wisest and undertake another whose chief merit may be that it is different from what any other market participant has chosen to do. The antitrust laws do not demand such foolishness.

Nor can Company B solve this conundrum by always being the first to act in response to a market development. Even the first mover, acting completely unilaterally, is vulnerable to private antitrust litigation under the decision below. Whether it will subsequently face an antitrust claim is entirely out of its hands—instead, it depends in part on whether a competing supplier takes similar action in response to the same market forces.

The Second Circuit itself acknowledged that the rule it adopted will contribute to inefficiency and frivolous litigation. Pet. App. 30a. That ought to be a giveaway that the decision below is wrong: a statute whose purpose is to promote the most efficient allocation of resources through competition instead promotes inefficiency and stifles competition.

II. MODERN ANTITRUST LITIGATION IS INTRUSIVE, DISRUPTIVE, AND EXPENSIVE

The Second Circuit conceded that its ruling would subject defendants in some frivolous cases to needless antitrust discovery. The Second Circuit maintained that it was helpless to do otherwise (relying on a mistaken reading of this Court's precedent), and suggested that Congress or this Court might appropriately intervene to prevent that result. Pet. App. 30a. This Court's intervention is warranted because it is essential to correct the Second Circuit's error before a single firm is subjected to antitrust discovery over a frivolous claim.

Empirical data about the costs of discovery in antitrust litigation is limited, but these costs are widely perceived to be growing at an exponential rate. A major law firm's annual study of litigation trends recently named electronic discovery as the biggest new litigation burden for large companies. S. Gawlicki, "GCs Find New Ways to Cut Discovery Costs," *Inside Counsel.com* (Dec. 1, 2005), *available at* http://www.insidecounsel.com/issues/insidecounsel/15_169/technology/236-1.html.

The scope and costs of compliance with a request for additional information from the government in a premerger investigation pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, may offer a reasonable proxy for discovery costs in private antitrust litigation. By one anecdotal measure of five investigations between 2001 and 2005, the volume of electronic data that had to be collected from each searched employee grew steadily from 0.74 gigabytes to 7.08 gigabytes—an increase of nearly 970% in about four years. S. Sher and D. Teshima, "e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations," *Antitrust Source* at 2 (November 2005), *available at* http://www.wsgr.com/PDFSearch/sher1105.pdf. Because of advances in technological culling methods, the number of documents selected from the initial harvest for

subsequent review by attorneys for responsiveness to the government information requests grew by "only" 300% over the same four years. *Id.* at 11.

The growth in the burden of discovery shows no signs of abating. According to evidence provided to the Antitrust Modernization Commission, the median cost of litigating a patent infringement case through trial is now $4,000,000, and the top 25% of these cases cost about $6,000,000. Comment of M. Kirk, American Intellectual Property Law Association, to the Antitrust Modernization Commission, (July 25, 2005), *citing* American Intellectual Property Law Association, 2003 Report of the Economic Survey 94 tbl 22 (2003), *available at* http://www.amc.gov/public_studies_fr28902/new_economy_pdf/05725_AIPLA-New%20Economy.pdf. The figures for antitrust cases are likely in the same range.

As the Second Circuit recognized, the prospective cost of such discovery creates powerful incentives for defendants to settle even the most unmeritorious case. Pet. App. 30a. A legal standard that fails to differentiate meritorious from unmeritorious cases and, in so doing, subjects innocent parties to what the Second Circuit itself recognized to be potentially "extraordinary" litigation costs, Pet. App. 15a, cannot be the standard intended by the federal rules. Indeed, the Second Circuit's mistake was to ignore the requirement under Rule 12(b)(6) jurisprudence that the plaintiff benefit from ***reasonable*** inferences. The Second Circuit incorrectly gave the plaintiff below the benefit of ***any and all*** inferences, reasonable or not. This cannot be and is not the appropriate standard. *Evans v. Pearson Enterprises, Inc.*, 434 F.3d 839, 847 (6th Cir. 2006) ("[w]e must accept [plaintiff's] . . . factual allegations as true and construe all reasonable inferences in her favor . . . [but o]n the other hand, this liberal standard . . . requires more than recitation of bare legal conclusions"); *Stachowski v. Town of Cicero*, 425 F.3d 1075, 1078 (7th Cir. 2005) (""[w]e . . . [take] the facts pleaded as

true and [construe] all reasonable inferences in favor of the plaintiff . . . . [but] are not required . . . to accept assertions of law or unwarranted factual inferences").

III. THE DECISION BELOW ERODES A FUNDAMENTAL DISTINCTION IN THE SHERMAN ACT BETWEEN UNILATERAL AND CONCERTED ACTION

The Sherman Act treats unilateral conduct much more leniently than concerted action—indeed, unilateral conduct is not prohibited by the Act unless it threatens monopolization. 15 U.S.C. §§ 1, 2. The decision below blurs this important distinction, at least prior to summary judgment.

There are several closely related policy reasons for the distinction. Concerted anticompetitive action ordinarily poses a far greater danger to competition than anticompetitive unilateral action. Two firms undertaking anticompetitive conduct in tandem are more likely than a single firm to succeed in harming the workings of the market, two colluding firms can resort to tactics that neither could successfully execute alone, and two firms working together can artificially expand their market power beyond what either would command on its own. VI Areeda & Hovenkamp ¶ 1402 at 8-11. In contrast, it is much rarer that anticompetitive unilateral action actually has significant anticompetitive effects. *Id.* at 8.

At the same time, the risks of over-deterrence are much greater for unilateral action than for concerted action. Antitrust restrictions on unilateral conduct short of monopolization chill aggressive competitive conduct of the type the Sherman Act aims to encourage. Antitrust restrictions on concerted actions are much less likely to deter procompetitive conduct. In light of these respective risks of over- and under-deterrence, the Sherman Act strikes a balance, condemning concerted conduct that actually has anticompetitive effects, while condemning unilateral action only if it threatens mo-

nopoly. It has therefore long been recognized that, absent a threat of monopolization, a firm has the right under the antitrust laws to conduct its business as it wishes. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

The existence of an agreement is thus a core element of a § 1 claim. Because of the competitive importance of determining this issue correctly, the range of inferences that may be drawn from ambiguous evidence of agreement in a § 1 case is limited. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "This higher threshold is imposed . . . to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition." *In re Flat Glass Litigation*, 385 F.3d 350, 357 (3d Cir. 2004).

The language of the Sherman Act, together with an appreciation of the need to preserve the competitive maneuverability of firms acting unilaterally, have persuaded some circuits to apply a "plus-factors" standard for evaluating antitrust conspiracy claims at the pleading stage of the case, if there are no allegations of direct evidence of conspiracy. *See, e.g., In re Flat Glass Litigation*, 358 F.3d at 360.

Under the plus-factors standard, an antitrust claim does not survive a motion to dismiss unless it alleges, in addition to parallel conduct and "a conspiracy," either direct evidence of conspiracy or other specific facts tending to show that the defendants illegally colluded. At the pleading stage, the plaintiff is not required to describe every aspect of the asserted conspiracy in detail. It must, however, offer some basis for its claims before it can invoke a discovery process that may either strip the defendant of millions of dollars or pressure it into a nuisance settlement. *See Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627, 1634 (2005).

To qualify as a plus factor, an allegation must be specific and it must "tend to exclude the possibility" of independent

action, *Matsushita*, 475 U.S. at 588, or "tend[] to establish collusion." *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1303 (11th Cir. 2003). There is no fixed list of all possible factors, but under the plus-factors analysis there is a requirement that the allegation be one that, if later proved, "tends to exclude" the possibility of independent action or "tends to establish" a conspiracy. *Williamson Oil*, 346 F.3d at 1303.

By rejecting a plus-factors standard at the motion to dismiss stage even where there is no allegation of direct evidence of conspiracy, the decision below improperly shifts the Sherman Act's balance in a way that punishes non-monopolistic single-firm conduct and deters vigorous, competitive behavior.

IV. THE DECISION BELOW INCORRECTLY APPLIES THE FEDERAL PLEADING RULES

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that alleges only parallel conduct and the conclusory label "conspiracy" does not provide the defendant with adequate notice of the claim against it nor show that the pleader is entitled to relief. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002).

As discussed above, bare allegations of parallel conduct, under *Matsushita*, do not state a claim for relief under Section 1 of the Sherman Act. And adding the word "conspiracy" does nothing because the word "conspiracy," standing alone, is a only a legal label. As the First Circuit has written, "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1999).

The decision below ignores Rule 8(a)'s requirement that the complaint show "that the pleader is entitled to relief." Proof of parallel conduct does not entitle a litigant to relief, and therefore, under an accurate reading of Rule 8(a), a claim of parallel conduct does not state a claim upon which relief may be granted. The bald assertion of "conspiracy" does not save the complaint because it is conclusory only, untethered either to allegations of plus factors or of direct evidence of conspiracy.

A court may not fill in the blanks that the plaintiff has left in its complaint. With a conspiracy claim as with any other claim, it is not appropriate for the court to assume that a plaintiff will prove facts it has not asserted or that "the defendants have violated the antitrust laws in ways that have not been alleged." *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 527 (1983). Rather, the allegations in a complaint must be sufficiently specific to "justify dragging a defendant past the pleading stage." *DM Research*, 170 F.3d at 55 (internal citations omitted). "[T]erms like 'conspiracy' . . . are border-line: they might well be sufficient in conjunction with a more specific allegation . . . but a court is not required to accept such terms as a sufficient basis for a complaint." *Id.*

The decision below also fails to give force to Rule 12(b)(6). Even twenty years ago, before the advent of electronic files and the explosion in discovery costs, the Seventh Circuit concluded that:

> When the requisite elements [of an antitrust violation] are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to provid-

ing antitrust litigation with an exemption from Rule 12(b)(6).

Car Carriers, Inc. v. Ford Motor Corp., 745 F.2d 1101, 1106-07 (7th Cir. 1984). Where, as here, the plaintiffs rely on parallel conduct as the sole factual basis for the allegation of conspiracy, the facts alleged, if proven, would not support a finding of conspiracy. A standard that allows such a bare complaint to survive a motion to dismiss guts Rules 8 and 12, and should be reversed.

CONCLUSION

The decision below addressed a claim brought in a highly regulated industry, but its adverse effects will be felt more broadly in commodity businesses as well. It threatens to interfere with efficient business operations and prolong frivolous antitrust litigation for businesses of many kinds across the nation.

The petition for a writ of *certiorari* should be granted and the decision of the Second Circuit reversed.

Respectfully submitted,

MARK FUCHS
GENERAL COUNSEL
LOUISIANA-PACIFIC CORP.
414 Union St.
Suite 2000
Nashville, Tennessee 37219
(615) 986-5600

PAUL H. FRIEDMAN
Counsel of Record
REBECCA P. DICK
DECHERT LLP
1775 Eye St., N.W.
Washington, DC 20006
(202) 261-3300

Counsel for Amicus